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No. 05-1398

In the Supreme Court of the United States

NEXBANK SSB, ET AL.,
Petitioners,

v.

AMERICAN HOMEPATIENT, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether the Court of Appeals' affirmance of the Bankruptcy Court's calculation of a cramdown interest rate expressed as the 6 year treasury bill rate + 350 basis points for risk, or 6.785%, conflicts with *Till*'s instruction to determine the interest rate in a Chapter 11 cramdown pursuant to either the formula approach or an efficient market analysis.

RULE 29.6 STATEMENT

American HomePatient, Inc. (a Delaware corporation) as substantively consolidated with 24 of its subsidiaries under its confirmed Chapter 11 Plan ("AHP," or the "Debtors") is a publicly-held company, but is neither a subsidiary nor an affiliate of a publicly owned corporation, nor is there any publicly held company that owns 10% or more of the stock of AHP.

The Unsecured Creditors Committee is not a publicly owned corporation, however certain of its members are. The members of the Unsecured Creditors Committee appointed by the United States Trustee on August 6, 2002 (Joint Respondent with the Debtor, American HomePatient, Inc.) are Invacare Corporation, Mallinckrodt, Inc., a Delaware Corporation, ResMed Corp., Respironics, Inc., and Ross Products, a division of Abbott Laboratories. Publicly-owned subsidiaries or affiliates of corporations on the Unsecured Creditors Committee are as follows: (1) Mallinckrodt, Inc., a Delaware corporation, is a third-tier subsidiary of Tyco International, a Bermuda corporation and Tyco International is a public company traded on the New York Stock Exchange; (2) ResMed Corp. is a direct subsidiary of ResMed, Inc., which is a public company traded on the New York Stock Exchange; and (3) Abbott Laboratories is a public company traded on the New York Stock Exchange.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASONS THE WRIT SHOULD BE DENIED 5

I. REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THE INTEREST RATE AFFIRMED BY THE COURT OF APPEALS' DECISION IS SOUND UNDER BOTH THE FORMULA APPROACH AND THE EFFICIENT MARKET APPROACH AND THUS PRESENTS NO CONFLICT WITH *TILL*. 5

A. *The Interest Rate Affirmed by the Court of Appeals Decision is Sound Under the Formula Approach and Presents No Conflict with* Till. 5

B. *The Interest Rate Affirmed by the Court of Appeals' Decision is Sound Under an Efficient Market Analysis and Presents No Conflict with* Till. 7

C. *The Petitioners are Seeking a Windfall, Not Present Value and This is Not What Till Requires* 8

D. *Conclusion: The Court of Appeals Decision Upholds an Interest Rate Calculated Consistent with the Formula Approach, Mindful of Characteristics Specific to the Actual Loan to the Actual Debtors Under an "Efficient Market" Analysis, and that Does Not Conflict With* Till 10

II. IT IS PREMATURE SPECULATION TO SUGGEST THAT LOWER COURTS ARE UNCERTAIN AS TO WHETHER AND HOW *TILL* APPLIES TO CHAPTER 11 REORGANIZATIONS. 12

III. NO SPLIT EXISTS AMONG THE COURTS OF APPEAL IN POST-*TILL* JURISPRUDENCE ON CRAMDOWN INTEREST RATES IN CHAPTER 11 CASES 13

CONLCUSION 16

APPENDIX 1, Transcript Excerpt 1b

APPENDIX 2, Treasury Current Value of Funds Rate . 2b

TABLE OF AUTHORITIES

CASES

GMAC v. Jones,
999 F.2d 63 (3rd Cir. 1993) 14

In re Hardzog,
901 F.2d 858 (10th Cir. 1990) 14

In re Smithwick,
121 F.3d 211 (5th Cir. 1997) 14

Till v. SCS Credit Corp.,
541 U.S. 465 . . . . . passim

STATEMENT OF THE CASE

Petitioners make several statements in their "Statement of the Case" that mischaracterize the record and must be corrected. Petitioners inaccurately state that the Debtors presented no evidence at trial that the present value of the Class 2 note was $250 million and that the "Debtors' experts Mr. Hurst and Mr. Rosen specifically declined to opine that the Class 2 note had a present value of $250 million, or, for that matter any other value." To the contrary, the Debtors' expert, Mr. Hurst, clearly and specifically testified that "the present value of the loan amount is 250-million." Resp. App. 1 at 1b. Further, Petitioners inaccurately state that the expert witnesses for the Debtors and the Petitioners "agreed" that the market would "require" a rate of return of over 12% for these Debtors. Instead, what the Debtors' experts actually testified was that *strictly arithmetically*, if the rates on the tranches of a more "traditional capital structure" such as that suggested by Petitioners' counsel were averaged or arithmetically blended, the resulting interest rate is 12.5%. Pet. App. 140a. The Debtors' experts agreed that the Petitioners' counsel's math was correct, nothing more.

SUMMARY OF ARGUMENT

The Court of Appeals decision affirming the cramdown interest rate imposed on Petitioners presents no conflict with *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). Under any reading of *Till*, there are only two available methods for calculating a cramdown rate of interest under any Chapter of the Bankruptcy Code. Under either the formula approach or an efficient market analysis, the Court of Appeals' decision presents no conflict with *Till*, no basis for certiorari exists, and the Writ should be denied.

Till holds that in a Chapter 13 case a cramdown interest rate must be calculated using a formula of the prime rate plus a risk adjustment generally in the range of 1-3% based on "the circumstances of the estate, nature of the security, [and] duration and feasibility of the plan."[1] Prior to the ruling in *Till*, albeit under the verbiage of the coerced loan theory, the Bankruptcy Court calculated the cramdown interest rate by starting with a risk-free base rate (6-year Treasury bill) and adjusting upward from that base rate (350 basis points) to account for risk attendant to the Plan and AHP's financial circumstances.[2] The Bankruptcy Court's methodology is thus faithful to the formula approach endorsed by *Till*.

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[1] *Till*, 541 U.S. at 479.

[2] The Debtors' expert opined that the appropriate interest rate for the senior debt instrument under the Plan was 350 basis points over LIBOR for a floating rate and over 6-year Treasury for a fixed rate. Pet. App. 132a. He applied a spread of 350 basis points based on an analysis of "the industry in which [AHP] operates, the term, the amortization period and the loan size." Pet. App. 133a.

The Petitioners appear largely to ignore *Till*'s adoption of the formula approach by refusing to acknowledge the formula itself which is prime + a general range of 1-3% adjustment for risk. Petitioners omit any substantive discussion of beginning with the prime rate, refuse to acknowledge this Court's reference to a 1-3% risk adjustment range, and instead interpret the risk adjustment as compelling consideration of "debtor-specific characteristics" in a manner wholly inconsistent with *Till* and §1129(b). To get away from the formula approach which they know will produce a rate they do not like, Petitioners cull through *Till* and cherry-pick to craft an argument to elevate the interest rate from providing present value to producing a windfall. Petitioners' suggestion that the rates on all financing possibilities in the global marketplace must be blended together to create a cramdown interest rate would redefine the "present value" standard of § 1129(b)(2) to ensure that no Chapter 11 debtor would ever be able to reorganize.

The rate imposed on Petitioners is 6 year Treasury bill + 350 basis points for risk. If straight application of the formula approach is all that *Till* requires in Chapter 11, the methodology employed by the Bankruptcy Court in calculating the cramdown interest rate remains sound and presents no conflict with *Till*. No basis exists for granting the Writ.

In the Chapter 11 context, however, the plurality in *Till* also penned footnote 14 which suggests that "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce."[3] If imposition of the cramdown interest rate an "efficient market

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[3] *Till*, 541 U.S. at 476, n. 14

would produce" is what is required under *Till* in Chapter 11, the Court of Appeals still correctly held that the Bankruptcy Court's ruling was sound and does not conflict with *Till*. The interest rate determined by the Bankruptcy Court was calculated based on an analysis of the actual market consistent with the *Till* footnote. No basis exists for granting the Writ.

The Petition does not speak in the language of *Till*. While *Till* speaks in terms of a simple formula or a market analysis approach to setting an interest rate, Petitioners argue for an interest rate driven solely by a risk assessment based on "debtor-specific characteristics." It is therefore nearly impossible to glean from the Petition which one of the approaches, either formula or "efficient market," the Petitioners believe should govern the computation of a cramdown interest rate in Chapter 11. The reason for this is simple. Petitioners want a windfall. Petitioners want to receive an interest rate of 12.16%. This interest rate is unsupportable under both the formula approach and the "efficient market" approach, or any other reasonable interpretation of *Till*. The rate of 6.785% upheld by the Court of Appeals is, however, sound under both approaches and, not coincidentally, is nearly identical to the contractual rate of interest the Petitioners had agreed to before the bankruptcy filing.[4]

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[4] Not to default to the prepetition contract rate, a proposition the *Till* plurality rejects, but simply to put the interest rate issue into perspective, the Court should be aware that the pre-petition interest rate payable to Petitioners was 6-month LIBOR plus 350 basis points, plus an excess leverage charge that roughly equated to another 100 basis points, or 6.5%. Pet. App. 60a. When the Bankruptcy Court rejected blending other rates of return on other types of financing or equity investments into the calculation, not surprisingly, the Court ended up at a rate not only consistent with

Finally, *Till* was decided less than two years ago. The only Court of Appeals to address the issue of setting a cramdown interest rate post-*Till* under any Chapter of the Bankruptcy Code is the Sixth Circuit in this case. Petitioners' suggestion that a split persists among the Courts of Appeal as to how to set a cramdown interest rate post-*Till* is premature speculation. No basis for certiorari exists and the Writ should be denied.

REASONS THE WRIT SHOULD BE DENIED

I. REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THE INTEREST RATE AFFIRMED BY THE COURT OF APPEALS' DECISION IS SOUND UNDER BOTH THE FORMULA APPROACH AND THE EFFICIENT MARKET APPROACH AND THUS PRESENTS NO CONFLICT WITH *TILL*.

A. *The Interest Rate Affirmed by the Court of Appeals Decision is Sound Under the Formula Approach and Presents No Conflict with Till.*

The Petition alleges that certiorari must be granted because the Sixth Circuit decision conflicts with *Till* in that it upheld a bankruptcy court opinion that did not consider characteristics specific to the debtor and to the "loan" to be made under the Plan. Petitioners thus focus unrelentingly on *Till*'s discussion of risk adjustment factors and opine at length as to which debtor-specific, loan-specific or market-based considerations ought to be included in that risk adjustment. This focus is, however, misguided.

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the efficient market, but also not markedly different than that negotiated between the parties pre-petition.

The risk adjustment factors are only part of the formula. In an effort to craft an argument for a grossly inflated interest rate based on their assessment of the Debtors' (allegedly unacceptably high) "debtor-specific" risk of nonpayment, Petitioners have lost sight of the fact that the risk adjustment factors are but one component of the formula approach. The Petition conveniently glosses over the fact that risk adjustment factors are only used to adjust off of a base rate, generally in the range of a 1-3% adjustment. The risk adjustment factors, be they debtor-specific, market-based or otherwise, do not set the interest rate in and of themselves. Computing an interest rate under the formula approach actually begins with the prime rate (or perhaps some other common base rate such as Treasury bill or LIBOR) which is then slightly adjusted upward for risk. Notwithstanding the Petitioners' apparent position that the risk adjustment factors are "controlling,"[5] and that an assessment of risk alone dictates what the interest rate should be, *Till* states that the adjustment off the base rate for risk of nonpayment is generally in the range of 1-3%, hardly the controlling piece of the formula puzzle.

This is the case regardless of which debtor-specific, loan-specific or market-based characteristics the Lenders think ought to be considered as "risk adjustment factors," and this is the case regardless of whether the property to be distributed under a plan is a note. An assessment of risk cannot function to double or triple the base rate under the formula approach. If the risk adjustment factors were the ultimate trump card, as

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[5] The Petition asserts that "[r]eversal is required because the court of appeals' decision fails to follow the rationale adopted by all nine justices in *Till* that consideration of the individual debtor's risk of nonpayment is *controlling* where the property to be distributed in the debtor's plan of reorganization is a note."

it were, the formula approach would be meaningless; the approach would cease to be a straightforward formula easily and predictably applied, all concept of uniformity would be lost, and courts would be left with a case of the proverbial tail wagging the dog.

Under the facts of this case, it is no surprise that the entire first piece of the formula which requires beginning with a base rate is largely ignored by Petitioners. If the Petitioners were to argue that *Till* mandates use of the formula approach in Chapter 11, they would find themselves arguing for a formula of prime + 7.75%, an eye-popping proposition indeed.[6]

The argument that debtor-specific or loan-specific characteristics "control" to set the cramdown interest rate is inconsistent with *Till*'s adoption of the formula approach and provides no basis on which to grant the Writ.

B. *The Interest Rate Affirmed by the Court of Appeals' Decision is Sound Under an Efficient Market Analysis and Presents No Conflict with* Till.

Petitioners cannot get to the interest rate they want under *Till*'s formula approach. Given that *Till* requires application of either the formula approach or, as the Sixth Circuit held, an "efficient market" analysis in Chapter 11, it would seem logical, then, that Petitioners would instead argue that the Writ must be granted on the basis that the Court of Appeals'

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[6] The Prime Rate was 4.25% at confirmation. (Resp. App. 2) Under the formula approach, the Petitioners would have to argue for a formula of prime + 7.75% to get to the 12.16% interest rate they request.

decision conflicts with *Till* because the courts failed to engage in an analysis of what rate an "efficient market" would produce. However, again, this is not what the Petition argues and, again, there is an obvious reason why not. If the Petitioners argue that an "efficient market" analysis controls to set the interest rate in Chapter 11 per *Till*'s footnote 14, then they are stymied. Any argument that the courts below failed to engage in a market-based analysis is foreclosed; the Court of Appeals specifically held that a market analysis was appropriate in Chapter 11 and specifically recognized that the Bankruptcy Court did engage in a market-based analysis to determine the cramdown rate. Pet. App. 18a-20a.

As noted by the Court of Appeals, the Bankruptcy Court "in fact sought to determine what an efficient market would have produced for the loan that the lenders provided" and reached its conclusion on the appropriate rate "only after carefully evaluating the testimony of various expert witnesses." Pet. App. 18a, 20a. "Although the lenders argue that the rate chosen by the bankruptcy court was not the rate produced by an efficient market, this is a question that was fully considered by that court." Pet. App. 19a. Any argument that the Writ should be granted because the courts below failed to consider debtor-specific or loan-specific characteristics is factually inaccurate: the Court of Appeals correctly held that the Bankruptcy Court actually engaged in an "efficient market" analysis to set the interest rate.

C. *The Petitioners are Seeking a Windfall, Not Present Value and This is Not What Till Requires*

Petitioners' insistence that "debtor-specific" and "loan-specific rates" must be considered under *Till* is rather beside the point. As either the "risk adjustment factor" component of the formula approach, or as a part of an analysis of the

"efficient market," those factors are and should be one component courts consider to set the interest rate. These loan and debtor specific risk factors indisputably were considered and caused the Bankruptcy Court to add 350 basis points when it set the interest rate. Pet. App. 108a.

However, Petitioners do not really want consideration of the actual "loan and debtor specific" factors relating to the Plan's actual "loan" to these actual Debtors. What the Petitioners really want considered under the guise of the labels "loan specific" or "debtor specific" factors are the rates on mezzanine financing and equity investments which have nothing whatsoever to do with the actual loan they are being forced to make to these actual Debtors under the Plan.

In an effort to compensate themselves as venture capitalists and elevate their rate of return beyond that of a provider of senior secured debt, Petitioners insist that the Bankruptcy Court erred by not applying a blended interest rate in excess of 12% to the Petitioners' secured claim. In making this argument, Petitioners ignore the goals of the Bankruptcy Code and drastically either misconstrue or misstate the holding of *Till*. Petitioners improperly insist that, in order to calculate the interest rate on the *debt* they are owed, they should be awarded a blended rate that includes the cost of *equity*, a result unsupported by either of the plurality, concurrence or dissenting opinions in *Till* or the policies implicit in the Bankruptcy Code.

The characteristics of each piece of a hypothetical mixed bag of financing theoretically available in the marketplace have no bearing on the characteristics of the real loan under the Plan. The suggestion of an "efficient market" analysis is not a mandate by this Court to focus on all conceivable financing possibilities which, under Petitioners' analysis,

include senior secured debt, equity investments and everything in between. The byzantine argument to average in all aspects of the global marketplace advanced by Petitioners in no way resembles any reasoned interpretation of *Till*.

Not all aspects of the global marketplace are relevant to this type of company borrowing this type of debt. As noted by the Court of Appeals, "the only type of debt contemplated by [AHP]'s reorganization plan was senior secured debt. The inclusion of other types of financing - mezzanine debt and equity - is a pure hypothetical suggested by the lenders." Pet. App. 18a. The actual result of that hypothetical would be an interest rate nearly eight percentage points higher than the 4.25% prime rate in effect on the date the Plan was confirmed which rate "appears to fall under the 'eye-popping' category described unfavorably by *Till*." Pet. App. 19a. At the 12% blended rate their "investment band" produces, Petitioners would receive a rate nearly double their prepetition contract rate and a windfall because of the bankruptcy filing. Pet. App. 117a.

D. *Conclusion: The Court of Appeals Decision Upholds an Interest Rate Calculated Consistent with the Formula Approach, Mindful of Characteristics Specific to the Actual Loan to the Actual Debtors Under an "Efficient Market" Analysis, and that Does Not Conflict With Till*

The tenor of the Petition could lead one to the conclusion that either the Court of Appeals decision was rendered before *Till* or that the Sixth Circuit simply followed their own "coerced loan" precedents and ignored *Till* completely. Neither is the case. In finding that the Bankruptcy Court indeed engaged in an "efficient market" analysis and the

interest rate that analysis yielded passed muster under *Till*, the Court of Appeals implemented *Till* in the Chapter 11 context.

The Court of Appeals (1) did not allow its consideration of the Bankruptcy Court's analysis to be constrained to a mere surface examination of the label "coerced loan theory" and (2) did not allow the "blended rate" hypothetical proposed by the Petitioners to cloud its consideration of the appropriate interest rate on the loan actually contemplated in the Plan. Casting labels aside, the Sixth Circuit specifically examined the Bankruptcy Court's underlying methodology and found that despite the Bankruptcy Court's use of "the rubric of the coerced loan theory," that methodology was sound under *Till*'s "efficient market" analysis. The Sixth Circuit further saw through Petitioners' attempts to be compensated as venture capitalists and to elevate their rate of return beyond that of a provider of senior secured debt. That is not present value, that is a windfall. The Sixth Circuit's affirmance of the Bankruptcy Court's ruling per the *Till* Chapter 11 "efficient market" footnote thus presents no conflict with *Till* and provides no basis for granting the Writ.

Finally, had the Sixth Circuit held that *Till* mandated use of the formula approach in Chapter 11 as well as Chapter 13, the decision below and the interest rate remain sound under *Till*. The Bankruptcy Court actually expressed the cramdown interest rate as a formulaic calculation akin to the methodology required by the *Till* plurality: the Bankruptcy Court took a risk-free rate (6-year Treasury) and adjusted upward for risk (adding 350 basis points), based on the Debtors' expert testimony regarding "the industry in which [AHP] operates, the term, the amortization period and the loan size," all of which are wholly consistent with *Till*'s directive to adjust based on the circumstances of the estate, the nature of the security, and the duration and feasibility of

the plan. Pet. App. 133a. Therefore, under either a formula approach or "efficient market" analysis, the Court of Appeals' decision presents no conflict with *Till* and the Writ should be denied.

II. It is Premature Speculation to Suggest that Lower Courts are Uncertain as to Whether and how *Till* Applies to Chapter 11 Reorganizations.

The gist of the argument at part II of the Petition is that the *Till* opinion (a) is so unclear regarding how this Court intended for cramdown interest rates to be calculated in Chapter 11 that it is useless and/or (b) as a plurality opinion, lacks precedential value such that this Court should grant the Writ in this case to issue a majority opinion and clarify what it intended for *Till* to say. These arguments provide no basis on which the Writ should be granted.

First, to suggest that *Till* is so unclear as to be incapable of application is disingenuous. The Sixth Circuit, the only Court of Appeals to apply *Till* to date, had no trouble issuing a ruling in a Chapter 11 case consistent with *Till*'s instruction. The Sixth Circuit found that, in the Chapter 11 context, courts should first ascertain if an "efficient market" exists. If so, courts should analyze that market and adopt the interest rate that analysis produces. If no efficient market exists, courts should apply the formula approach. Pet. App. 16a. The Sixth Circuit's decision thus does not conflict with *Till*'s instruction, it implements the *Till* Chapter 11 footnote. While Petitioners may not like the rate produced by an efficient market analysis in this case, they nonetheless cannot dispute that courts are capable of following *Till*. *Till* clearly suggests an "efficient market" analysis in Chapter 11 and same was in fact employed below. Pet. App. 18a.

Secondly, while commentators and perhaps a handful of lower courts may be as of yet unsure about *Till*'s precedential value, lack thereof, or applicability to Chapter 11 reorganizations, the state of the law as it exists today does not rise to a level of uncertainty sufficient to declare a conflict among the Courts of Appeal worthy of intervention by this Court. Unless and until the various Courts of Appeal have an opportunity to address cramdown interest rates in Chapter 11 cases post-*Till*, whether a further ruling from this Court in the Chapter 11 context will be necessary remains to be seen.

On this point, it should be noted that the leading Circuit Court level decisions on cramdown interest rates pre-*Till* were Chapter 13 cases all of which were specifically addressed by *Till*. In fact, AHP would suggest that the issue of setting a cramdown rate is litigated most often in the Chapter 13, not Chapter 11, context. Thus, it is likely that this Court, in clearly adopting the formula approach for Chapter 13 cases, has already addressed the issue in the vast majority of cases in which the question presents itself. While the commentators and authors cited in the Petition may enjoy the mental exercise of speculating on the future of *Till*'s application in Chapter 11, until that speculation in law journals becomes a reality in the courtroom, the issue is unripe for further consideration by the Court.

III. NO SPLIT EXISTS AMONG THE COURTS OF APPEAL IN POST-*TILL* JURISPRUDENCE ON CRAMDOWN INTEREST RATES IN CHAPTER 11 CASES

Arguments III. and IV. in the Petition may be addressed together as they are variations on a common theme: that a split exists among the Courts of Appeal on whether to consider "debtor-specific" criteria in setting a cramdown interest rate. This argument may be summarily disposed of

because no current split among the Courts of Appeal exists. Additionally, it should be noted that this argument is a red herring in this specific case because no amount of insistence on consideration of "debtor-specific traits" will justify inflation of the interest rate as Petitioners seek, and debtor-specific traits were in fact considered to set the interest rate in this case.

As to the argument that a split in the Circuits on methodology for setting cramdown interest rates continues to exist post-*Till*, it is indisputable that *Till* overruled many existing decisions by the Courts of Appeal and overhauled the law. Any suggestion, then, that pre-*Till* holdings by Courts of Appeal rejecting the formula approach and endorsing the presumptive contract rate, cost of funds, coerced loan and risk free approaches to setting an interest rate remain good law and create a continuing conflict among the Circuits is inaccurate.[7]

The split among the Circuits as it existed pre-*Till*, with the Courts of Appeal endorsing a myriad of approaches to setting a cramdown interest rate, exists no longer. Many of those decisions by the Courts of Appeal can no longer stand as written. For example, notwithstanding the pre-*Till* case of *GMAC v. Jones*, 999 F.2d 63 (3rd Cir. 1993) in the Third Circuit adopting the presumptive contract approach, a bankruptcy or district court in the Third Circuit today could

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[7] For example, the following cases which expressly rejected the formula approach have been overruled by *Till*: *In re Smithwick*, 121 F.3d 211 (5th Cir. 1997) (rejecting formula approach as codified in local rule); *General Motors Acceptance Corp. v. Jones*, 999 F.2d 63 (3rd Cir. 1993) (express rejection of formula approach); *In re Hardzog*, 901 F.2d 858 (10th Cir. 1990) (express rejection of formula approach).

not simply apply the presumptive contract rate approach, cite to *Jones* and be done. That would be untenable after *Till* because *Till* changed the law. Unless and until the Courts of Appeal address the issue post-*Till*, any suggestion of a continuing conflict is pure speculation.[8]

Secondly, attempts to reframe the issue presented in order to create the appearance of a conflict among the Circuits are futile under the facts of this case. No amount of reframing the issue at bar into the propriety of "consideration of characteristics specific to the debtor" will justify inflation of the interest rate to the heights Petitioners seek. The Petitioners vehemently resist discussing *Till*'s adoption of the formula approach or the "efficient market" approach to setting the cramdown interest rate because, as to the former, Petitioners cannot reasonably argue for prime + 7.75% in light of *Till*'s suggestion of a 1-3% adjustment range and, as to the latter, every court below found that the rate Petitioners are receiving is the market rate for senior secured debt in the home healthcare industry. In short, neither approach endorsed by this Court in *Till* can possibly provide the rate of return the Petitioners seek. Use of the term "rate of return" here is not accidental; as discussed above, what Petitioners seek is a windfall, not present value.

Finally, incessant insistence on an alleged disagreement among the Circuits as to the propriety of considering"debtor-

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[8] Likewise, whether a split exists among the Courts of Appeal regarding consideration of debtor-specific traits in setting the interest rate on a tax claim paid under §1129(a)(9)(C) has little bearing on the issues presented in the case at bar. There is no current split among the Circuits on the issue presented - the methodology to set a cramdown interest rate - as no Court of Appeals other than the Sixth Circuit has ruled post-*Till*.

specific traits" is, respectfully, pointless. Whether or not such disagreement existed pre-*Till* or exists now, this argument provides no basis for granting the Writ in this case. The actual home healthcare market and the interest rate for senior secured debt therein were analyzed, the specific characteristics of these Debtors were actually considered, and the interest rate was upwardly adjusted 350 basis points as a result. What Petitioners insist should have been done was in fact done. Petitioners' insistence that this Court should grant the Writ to direct consideration of debtor- and market-specific traits to set the interest rate is nonsensical in the face of a Court of Appeals ruling that the Bankruptcy Court did just that.

CONCLUSION

The Petitioners position is abundantly clear - they wish to be compensated at an interest rate far in excess of the *Till* formula of the prime rate + a 1-3% risk adjustment; far in excess of the actual efficient market-produced rate for senior secured debt in the home healthcare industry; and, it is also noteworthy, far in excess of the pre-petition rate they were receiving under their contract. Pet. App. 117a-118a, 120a. In seeking an interest rate that would under the formulaic language of *Till* have to be expressed as at least prime +7.75%, that is nearly double the rate produced in the efficient market, and that is nearly double the prepetition contract rate, Petitioners ignore the fundamental reality that the Bankruptcy Code expressly allows creditors to have their debts restructured, sometimes, as here, against their will. The Court of Appeals decision upholds an interest rate consistent with both the formula approach and an efficient market analysis under *Till* and there is no basis on which the Writ should be granted.

In an effort to avoid the above result, Petitioners attempt valiantly to reframe the issue and present arguments in such a way as to create the appearance of a conflict among the Courts of Appeal where none can possibly exist at this time. Arguments in support of an alleged conflict among the Circuits by citation to decisions that have been overruled present no justification for granting the Writ in this case. It remains to be seen how the caselaw will develop and how the several Courts of Appeal will implement *Till*; it is simply too soon to tell.

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

Transcript Excerpt

* * * * *

[p. 188]

Q. Okay. This is a dumb question because I don't see anywhere in there where it says present value.

A. If you – if you have the correct rate and a coerced loan approach – if the coerced loan approach is applicable, and the rate is six-point-eight percent, and you pay six-point-eight percent, and the present value of the loan amount is 250-million.

* * * * *

APPENDIX 2

Fam No. 2002-20
(Treasury Current Value of Funds Rate)

November 21, 2002

FINANCIAL ADMINISTRATION MEMORANDUM NO. 2002-020 (II.J.)

To: Bureau Assistant Directors, Administration
Chief Executive Officer, National Business Center
Bureau Finance Officers
Finance Officer, Financial Management Services
Director, Office of Acquisition and Property Management

From: William E. Webber /s/
Focus Leader, Asset and Debt Management
Office of Financial Management

Subject: Treasury Current Value of Funds Rate

Attached is a copy of the Federal Register, Volume 67, No. 205, page 65187, dated October 23, 2002, which contains the Current Value of Funds Rate (CVFR) for calendar year 2003. The CVFR is 2 percent for the period beginning on January 1, 2003, and ending on December 31, 2003.

The CVFR is required for use in the following financial calculations:

- Assessing interest charges for outstanding debts on claims owed to the Federal Government.

- Determining whether to accept cash discounts by paying early. Prompt Payment rules require agencies to analyze the total costs and total benefits to the Government of accepting a discount and paying early. The discount conversion formula is available at www.fms.treas.gov/prompt/formulas.html.

-Determining when to pay purchase card invoices when a rebate is offered by the credit card issuer. Prompt Payment rules require agencies to analyze the total costs and benefits to the government of taking advantage of a credit card issuer's rebate offered for early payment. A spreadsheet at www.fms.treas.gov/prompt/rebate/html automatically calculates when agencies should pay credit card invoices, based on the daily rebate basis points and the daily CVFR basis points.

Should you have any questions on this subject, please contact Michael Anthony on (202) 208-6824.

Attachment (PDF, HRML)

Prior Financial Administration
Memorandums on this Subject:

No. 2002-010 (II.J), July 8, 2002 - Active

Treasury Current Value of Funds Rate

The Current Value of Funds rate (CVFR) is used to calculate interest on overdue Federal Government receivables and to determine the effectiveness of taking cash discounts (1 TFM 6-8040.40) on Government payments. Interest charged is simple interest at the rate in effect at the time the debt becomes overdue. The rate of interest remains fixed for the duration of the indebtedness (1 TFM 6-8025.20). See Treasury's Cash Management Regulations 1 TFM Chapter 6-8000 for more information.

The CVFR is based on the Treasury Tax and Loan (TT&L) rate for the 12 month period ending the previous September 30, rounded to the nearest whole percent. Published quarterly until ~~1986~~, the CVFR is now published annually in the Federal Register by October 31. The rate is calculated quarterly on a 12 month rolling average of TT&L rate and is subject to revision only if the published rate changes by 2 percentage points at the close of the prior calendar quarter. Changes in the CVFR will be published in a TFM Bulletin.

Updates:

Current Rates

- Jan 1-Jun 30, 2003: 2.0%
- Jul 1-Dec 31, 2003: 3.0%

For a recorded message with the current rate available 24 hours a day call 202-874-6995.

Rate History

Prior to 1978, Federal agencies determined their own interest rates for overdue debt. Following are the rates in effect during the specified periods from march 1978 to date:

Time Period	Rate	TFM Bulletin No.	Fed. Reg.
1/1/02-12/31/03	2.00%	2003-02	Vol. 67/ Oct. 23, 2002/ 65187
7/02-12/31/02	3.00%	2002-05	Vol. 66/ Apr. 24, 2002/ 20203
1/1/02-6/30/02	5.00%	2002-02	Vol. 66/ Oct. 25, 2001/ 54060
1/1/01-12/31/01	6.00%	2001-02	Vol. 65/ Oct. 31, 2000/ 65040
1/1/00-12/31/00	5.00%	2000-03	Vol. 64/ Oct. 29, 1999/ 58467
1/1/99-12/31/99	5.00%	99-03	Vol. 63/ Oct. 30, 1998/ 58457
1/1/98-12/31/98	5.00%	98-05	Vol. 62/ Oct. 28, 1997/ 55848
1/1/97-12/31/97	5.00%	97-02	Vol. 61/ Oct. 30, 1996/ 56086
1/1/96-12/31/96	5.00%	96-02	Vol. 60/ Oct. 26, 1995/ 54911

7/1/95-12/31/95	5.00%	95-08	Vol. 60/ Apr. 28, 1995/ 21024
1/1/95-6/30/95	3.00%	95-06	Vol. 59/ Nov. 1, 1994/ 54672
1/1/94-12/31/94	3.00%	94-03	Vol. 58/ Oct. 28, 1993/ 58037
1/1/93-12/31/93	4.00%	93-02	Vol. 57/ Oct. 27, 1992/ 48651
1/1/92-12/31/92	6.00%	92-03	Vol. 56/ Oct. 28, 1991/ 55521
1/1/91-12/31/91	8.00%	91-02	Vol. 55/ Oct. 30, 1990/ 45710
1/1/90-12/31/90	9.00%	90-02	Vol. 54/ Oct. 30, 1989/ 45886
1/1/89-12/31/89	7.00%	89-02	Vol. 53/ Nov. 15, 1988/ 46010
1/1/88-12/31/88	6.00%	88-02	Vol. 52/ Nov. 30, 1987/ 45523
1/1/87-12/31/87	7.00%	87-03	Vol. 51/ Nov. 25, 1986/ 42673
1/1/86-12/31/86	8.00%	86-02	Vol. 50/ Oct. 31, 1985/ 45524
10/1/85-12/31/85	9.00%	85-16	Vol. 50/ Aug. 5, 1985/ 31668
7/1/85-9/30/85	9.00%	85-11	Vol. 50/ May 2, 1985/ 18761

4/1/85-6/30/85	9.00%	85-05	Vol. 50/ Jan. 31, 1985/ 4609
1/1/85-3/31/85	9.00%	85-04	Vol. 49/ Oct. 31, 1984/ 43830
10/1/84-12/31/84	9.00%	84-17	Vol. 49/ Aug. 3, 1984/ 31190
7/1/84-9/30/84	9.00%	84-12	Vol. 49/ Apr. 30, 1984/ 18373
4/1/84-6/30/84	9.00%	84-09	Vol. 49/ Jan. 27, 1984/ 3560
1/1/84-3/31/84	9.00%	84-04	Vol. 48/ Oct. 26, 1983/ 49571
10/1/83-12/31/83	9.00%	83-29	Vol. 48/ Jul 26, 1983/ 33961
7/1/83-9/30/83	11.00%	83-21	Vol. 48/ May 2, 1983/ 19814
4/1/83-6/30/83	13.00%	83-15	Vol. 48/ Jan 25, 1983/ 3443
1/1/83-3/31/83	13.00%	83-05	Vol. 47/ Oct. 29, 1982/ 49137
10/1/82-12/31/82	11.98%	82-26	Vol. 47/ Sept. 20, 1982/ 41459
7/1/82-9/30/82	14.26%	82-16	Vol. 47/ Jun. 18, 1982/ 26489
4/1/82-6/30/82	13.22%	82-09	Vol. 47/ Mar. 19, 1982/ 12006

1/1/82-3/31/82	14.39%	82-05	Vol. 46/ Dec. 16, 1981/ 61383
10/1/81-12/31/81	18.35%	81-14	Vol. 46/ Sep. 17, 1981/ 46273
7/1/81-9/30/81	16.19%	81-09	Vol. 46/ Jun. 17, 1981/ 31804
4/1/81-6/30/81	17.74%	81-06	Vol. 46/ Mar. 25, 1981/ 18637
1/1/81-3/31/81	13.14%	81.04	
10/1/80-12/31/80	9.09%	80-11	
7/1/80-9/30/80	14.72%	80-08	
3/31/78-6/30-80	9.00%		